United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

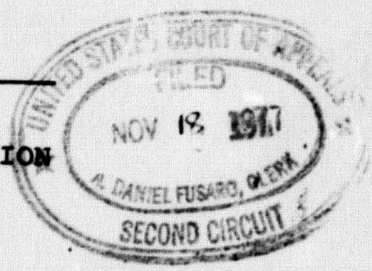
77-6125

No. 77-6125

11/2/77

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



IN THE MATTER OF: ESTABLISHMENT INSPECTION
OF : M & B INDUSTRIES CORPORATION

RAY MARSHALL, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Plaintiff-Appellee,

v.

M & B INDUSTRIES CORPORATION, 1261 38th STREET, BROOKLYN, NEW YORK 11218

Defendant- Appellant

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF LABOR

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RAY MARSHALL, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Plaintiff-Appellee,

v.

M & B INDUSTRIES CORPORATION, 1261 38th
STREET, BROOKLYN, NEW YORK 11218

Defendant- Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF LABOR

COUNTERSTATEMENT OF QUESTION PRESENTED

(1) Whether the District Court was correct in issuing the warrant in this matter.

COUNTERSTATEMENT OF THE CASE

1. Nature of the Case

This matter is before the Court upon Defendant-Appellant's appeal from the District Court's signing of a warrant for inspection of Defendant-Appellant's premises on July 25, 1977.

2. Counterstatement of Facts

A. Regulatory Background

The Occupational Safety and Health Act of 1970 is designed "to secure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. 651). [1] The Supreme Court in Atlas Roofing Company, Inc., v. Occupational

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[1] The need for the Act is explained in S.Rep. No. 91-1282, 91st Cong., 2d Sess. 2-4 (1970); Subcommittee on Labor of the Senate Committee, 92d Cong., 1st Sess., Legislative History, of Occupational Safety and Health Act of 1970 ("Leg. Hist.") 142-144 (Comm. Print 1971):

> The problem of assuring safe and healthful workplaces * * * ranks in importance with any that engages the national attention today. * * * 14,500 persons are killed annually as a result of industrial accidents; * * * during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2. million persons are disabled on the job each year, resulting in the loss of 250 million man days of work--many times more than are lost through strikes * * * [and] the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 million. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. In sum, the chemical and physical hazards which characterize modern industry are not the problem of * * * a single industry, a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.

Safety and Health Review Commission, _____ U.S. _____, 97 S.Ct. 1261, (1977) which upheld the administrative fact - finding without a jury created by the Act, noted that the Act creates a federal statutory duty to avoid maintaining unsafe or unhealthy working conditions applicable to all non-governmental employers whose business affects commerce. (29 U.S.C. 654(a)(1) and (2)). The law is enforced through a self-contained administrative system, emphasizing speedy, expert, and uniform identification and abatement of hazardous working conditions.

Under the Act's expedited enforcement procedures, the Secretary's inspectors are authorized to conduct safety and health inspections at reasonable times and in a reasonable manner at places of employment. (29 U.S.C. 657(a)). If upon inspection the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, proposing a reasonable time for its abatement, and (in his discretion) proposing a civil monetary penalty. (29 U.S.C. 658, 659).

The Act's enforcement mechanisms thus depend on the Secretary's ability to conduct inspections to identify hazards threatening employees. That ability is assured by the carefully-limited authority to enter and inspect workplaces "with-

out delay and at reasonable times * * * within reasonable limits and in a reasonable manner" for job safety purposes created by Section 8(a), (29 U.S.C. 657(a)). [2] Without such inspection power the Secretary cannot conduct the unscheduled, unannounced visits contemplated by the Act. [3] The constant possibility of such inspections, and the knowledge that violations discovered by the inspectors will lead to monetary sanc-

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[2] Section 657(a) provides:

In order to carry out the purposes of this Act, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --

> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein * * *

[3] Moreover, without the authority to inspect he cannot confirm worker complaints to imminent dangers or other hazards, (29 U.S.C. 657(f), 662); investigate job-related fatalities or catastrophes, cf. (29 C.F.R. 1904.8); reinspect workplaces to determine compliance with abatement orders, (29 U.S.C. 659(b), 660(b)); or investigate claims that employers have retaliated against workers for exercising their rights under the statute. (29 U.S.C. 660(c)).

tions, are essential to secure the broad voluntary compliance on which the program depends. [4] Congress recognized that workplace hazards are in the main so transient or easily concealed that unannounced spot checks were warranted, since "advance notice to an employer has been a prime cause of the breakdown in * * * enforcement" under other safety statutues. [5]

Congress accordingly provided that the inspection is to be without advance notice (29 U.S.C. 651(10)) [6] and the inspector is authorized to enter the premises to be inspected "without delay" (29 U.S.C. 657(a)).

Congress and the Secretary were also sensitive to the interests of the owners and occupants of the premises inspected. Inspections must be conducted "during regular working hours and at other reasonable times" (29 U.S.C. 657(a)), and without unreasonable disruption of the employers' operations

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[4] See, e.g., 29 U.S.C. 659(a) and (b); Usery v. Godfrey Brake & Supply Service, 545 F.2d 52, 54-56 (8th Cir. 1976); Dunlop v. Rockwell International, 540 F.2d 1283, 1292 (6th Cir. 1976); Brennan v. Review Commission and Interstate Glass Co., 487 F.2d 438, 441, 443 (8th Cir. 1973); Cf. Nat'l Indep. Coal Operator's Ass'n. v. Kleppe, 423 U.S. 389, 401 (1973); Godwin v. Review Commission, 540 F.2d 1013, 1016 (9th Cir. 1976).

[5] H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 27 (1970); Leg. Hist. 857.

[6] Indeed, any person who gives advance notice of an inspection is punishable by a fine of not more than $1,000 or imprisonment for not more than six months. 29 U.S.C. 666(f).

(29 U.S.C. 657(d); 29 C.F.R. 1903.7(c) and (d). Departmental area directors usually select the premises to be inspected, not the individual inspectors. No inspection can be made without "presenting appropriate credentials to the owner, operator, or agent in charge" of the worksite sought to be inspected, (29 U.S.C. 657(a)); those credentials paraphrase and cite the statutory authority to inspect. [7] The inspector is additionally required to explain the nature, purpose and scope of the proposed inspection, 29 C.F.R. 1903.7(a), which may not exceed the Act's limitation to occupational hazard investigations. (29 U.S.C. 657(a)). The employer is entitled to accompany the inspector during his tour of the relevant premises, and may raise privacy or other objections to the conduct of the inspection. (29 U.S.C. 657(e)); 29 C.F.R. 1903.4, 1903.7(e), 1903.8. [8]

The investigation is limited in scope to the discovery of occupational hazards (29 U.S.C. 657(a)), and poses

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[7] See, Usery v. Godfrey Brake & Supply Service, supra, 54-55 & n.4. Inspectors may offer a toll-free verifying call to the area offices if these credentials do not convince employers of the propriety of the inspection. Id.

[8] Trade secrets and other compelling privacy interests of the employees are explicitly protected. (29 U.S.C. 664-665); 29 C.F.R. 1903.9.

virtually no threat of criminal liability. [9] Inspections which reveal violations do not lead to criminal or quasi-criminal prosecutions, even where repeated non-compliance is involved; enforcement is by civil penalties. [10]

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[9] (29 U.S.C. 658-659, 666(a) through (d), 666(h) and (j)). See, e.g., Atlas Roofing Co., v. OSHRC and Department, supra The Act does authorize criminal sanctions in one narrow circumstance, willful violations causing employees death. 29 U.S.C. 666(e). However, of approximately 400,000 inspections conducted since the Act's April 1971 effective date, only five have resulted in further investigations leading to criminal prosecution under this provision. Cf. Argersinger v. Hamlin, 407 U.S. 25, 38-39 & n.10 (1972).

[10] The Act provides no sanctions at all for refusals to permit inspection. The Secretary is relegated to ordinary civil process in the district courts. See, e.g., 29 C.F.R. 1903.4; Brennan v. Buckeye Industries, 374 F.Supp. 1350, 1352-1353 (D.Ga. 1974), appeal pending 5th Cir.

B. The Proceddings Below

On June 15, 1977, Joseph F. Switzer and Willie Purvis, compliance officers and authorized representatives of the Occupational Safety and Health Administration, United States Department of Labor, attempted to conduct an inspection, during normal working hours pursuant to section 8(a) of the Act, of M & B Industries, Inc. located at 1261 38th Street, Brooklyn, New York. Upon presentation of their credentials to Abraham Friedman, President, M & B Industries, Inc., these authorized representatives of the Secretary of Labor were denied entry and the right to inspect and investigate such place of employment. Thereafter, on July 25, 1977, an inspection warrant was issued by United States District Judge Thomas E. Platt ordering the entry, inspection and investigation of the aforesaid workplace. Mr. Friedman moved for reconsideration of the Court's decision, and in the event of a denial thereof, for a stay of the inspection warrant pending appeal to the United States Court of Appeals for the Second Circuit. The motion for reconsideration was denied but a stay was granted through August 16, 1977. On August 11, 1977, Mr. Friedman filed a motion in the United States Court of Appeal for the Second Circuit for an extension of the District Court's stay pending appeal of the inspection warrant. Said motion was granted to the extent that the stay was ordered through August 19, 1977. On August 19, 1977,

Mr. Friedman's motion for a further stay was denied by the Court of Appeals. On August 23, 24, 26 and 29, 1977 and on September 16, 1977, Joseph F. Switzer and Julio Carballo, compliance officers and duly designated representatives of the Occupational Safety and Health Administration, United States Department of Labor, attempted to serve said inspection warrant and conduct such inspection but were denied entry to defendants' aforesaid workplace by representatives of defendant corporation.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN ISSUING THE WARRANT IN THIS MATTER

A. Fourth Amendment Challenge

Defendant-Appellant has challenged the Act's inspection procedure, under Section 8(a), as being contrary to the Fourth Amendment of the Constitution. This appears to have been a major premise to Defendant-Appellant's refusal to allow a timely inspection of its workplace, notwithstanding that the Secretary had obtained an inspection warrant under which it chose to perform said safety and health inspection.

Significantly, a challenge to Section 8(a) of the Act's procedure for warrantless inspections under the Fourth Amendment of the Constitution is presently before the Supreme Court under the case of Ray Marshall, Secretary of Labor v. Barlow's, Inc., No. A-600. This case came to the Supreme Court under an order issued by the District Court for the District of

Idaho, No. 1-76-3 (three-judge court), enjoining the Secretary of Labor from enforcement of Section 8(a) of the Act. Significantly, the Supreme Court has stayed all parts of the injunction except as it applies to the Secretary and Barlow's, Inc. It should be recognized that in the instant case, as opposed to Barlow's, the matter is before this Court upon a duly issued warrant obtained by the Secretary to gain access to Defendant-Appellant's workplace. [11]

Significantly, numerous cases have been decided balancing Section 8(a)'s warrantless inspection procedure against the Fourth Amendment protections. In all such cases, except Barlow's, the courts have not struck down Section 8(a) as being unconstitutional. Brennan v. Buckeye Industries, supra, upholding limited warrantless inspection under Section 8(a); Dunlop v. Able Contractors, Inc., Civ. No. 75-57-BLD (D. Mont., December 15, 1975), appeal pending, 9th Cir., upheld limited warrantless inspections under Section 8(a), Usery v. Northwest Orient Airlines, 1977 OSHD ¶21,905 (DC NY ED 1977), indicating warrantless inspections are acceptable, Brennan v. Gibson Products of Plano, Inc., 407 F. Supp. 154 (E.D. Tex. 1976) (three-judge court), appeal pending in 5th Cir., the court held absent consent a warrant based on probable cause standards, as prescribed in Camara v. Municipal

[11] Thus the question before the Supreme Court in Barlow's of whether or not the Secretary's warrantless inspection procedures violate the Fourth Amendment is not presented by this appeal.

Court, 347 U.S. 523 (1967) and See v. Seattle, 387 U.S. 541 (1967), is appropriate to administrative searches.

The court in Brennan v. Gibson Products, supra, while indicating that a warrant would be necessary to gain involuntary access to the workplace by the Occupational Safety and Health Administration Compliance Officer, held Section 8(a) of the Act fully consistent with the Constitution. Numerous other cases attempting to balance the competing interest under OSHA have sustained the Act's inspection provisions, while following the basis rule outlined in the Gibson Products case, supra. See Dunlop v. Hertzler Enterp. ses, 418 F. Supp. 627 (N. Mex. 1967) (three-judge court), appeal pending 10th Cir.; Usery v. Rupp Forge Co., No. C-76-385 (N.D. Ohio, April 19, 1976), appeal pending 6th Cir.

Moreover, in cases decided after the Barlow's decision which Defendant-Appellant relies upon in its argument in support of its challenge to the issuance of the warrant, both the United States Court of Appeals and the district courts have upheld and enforced the occupational safety and health inspections conducted under Section 8(a) of the Act; these courts have specifically not followed the Barlow's decision. The Centrif-Air Machine Co., Inc., 1976-77 OSHD ¶21,478, a copy of said opinion being attached hereto, marked Exhibit A and made a part hereof; In the Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Company, 1977 OSHD ¶21,798, a copy of said opinion being attached hereto, marked Exhibit B and made a part hereof (7th Circuit's denial of stay, No. 77-1459, dated

May 13, 1977); Usery v. Northwest Orient Airlines, supra, holding a warrant in the first instance may be unnecessary; Dravo Corporation v. Marshall, USDC Penn WD, Civil No. 77-284 (1977), a copy of said opinion being attached hereto, marked Exhibit C and made a part hereof.

It should be further noted that the Supreme Court has, on March 23, 1977, held that the Act is consistent with the Seventh Amendment (Atlas Roofing Company, Petitioner v. OSHRC, No. 75-746, and Frank Irey, Jr., Inc. v. OSHRC, No. 75-748, 97 S.Ct. 1261 (1977)).

Moreover, the courts have uniformly followed the maxim that statutory provisions should be construed so as to uphold their constitutionality. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Significantly, Justice Rehnquist, in granting in full the Secretary's motion for a stay of Barlow's injunction, stated "I think that the Act of Congress presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court."

In view of the significant case law and authority and the particular facts of the case, the Plaintiff-Appellee respectfully submits that Defendant-Appellant's Fourth Amendment challenge is not meritorious and that the District Court's decision to issue the warrant in this matter was correct.

B. Challenge to probable cause of warrant

Defendant-Appellant has argued in support of its refusal to comply with the inspection warrant, that probable cause for said warrant was not present. First, the Plaintiff-Appellee Secretary submits that warrantless inspections are appropriate under Section 8(a) of the Act. Brennan v. Buckeye Industries, supra; Dunlop v. Able Contractors, Inc. supra; Usery v. Northwest Orient Airlines, supra. However, where administrative warrants are obtained, probable cause requirements are satisfied by the enforcement purposes behind the law under which the inspection is to be made when said inspection relates to the public safety and health. Camara v. Municipal Court, supra, 875 U.S., at p. 539, (87 S.Ct. 1736):

> The warrant procedure is designed to guarantee that decision to search priviate property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitable restricted search warrant. Cf. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 66 S.Ct. 494, 90 L. Ed. 614. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. See Eaton v. Price, 364 U.S., at 273-274, 80 S. Ct., at 1468-1469 (opinion of Mr. Justice Brennan).

Indeed the Court, in Camara, pointed out that even the passage of time can satisfy probable cause requirements (387 U.S. 538, 87 S.Ct. 1735):

". . . This is not to suggest that a health official need show that same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." 359 U.S., at 383, 79 S. Ct., at 87 (Mr. Justice Douglas, dissenting).

Additionally, the Supreme Court in Camara, supra, stated that "probable cause" to issue a warrant exists in those instances where there are "reasonable legislative or administrative standards for conducting an . . . inspection. . ." Moreover, the court specifically recognized that probable cause developed from such a program need not depend "upon specific knowledge of the condition" sought to be corrected (at 387 U.S. 538; 87 S.Ct 1736). [12] Clearly, the June 2, 1977 letter from the New York

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12/ Defendant-Appellant argues that "probable cause" to gain entry into the workplace can only be predicated upon a sworn or notorized showing. Not only is this propostion directly in conflict with the Camara decision, but it is inapposite to the very heart of the Act which was enacted to discover health and safety hazards before said conditions cause or inflict harm upon employees.

City Fire Department to the Regional Administrator of the Occupational Safety and Health Administration, satisfies the tests set out by the Supreme Court in Camara, supra. (See Exhibit A attached to affidavit of Joseph F. Switzer in support of the Secretary's Application for an Inspection Warrant)

Accordingly, the instant case represents a matter wherein the information provided the District Court in the Application For Warrant went far beyond that required for administrative inspections, as outlined in Camara and See, supra. The Application for Warrant filed herein clearly pointed out to the Court that (1) the inspection was part of an inspection and investigation program designed to assure compliance with the Act and was authorized by Section 8(a) and further, was to be conducted during the regular working hours or other reasonable times within reasonable limits and in a reasonable manner in accordance with Section 8(a) of the Act; and (2) the inspection was sought to determine if possible violations, as indicated in a request for an inspection from the New York City Fire Department, existed.

Thus, issuance of the warrant was well supported by the carefully administered, comprehensive program specifically aimed at detecting and correcting pervasive workplace hazards and dangers to which employees are exposed, as above discussed.

This case deals with matters which more than fulfull the Supreme Court test for probable cause, the application to the District Court setting forth significant information upon which it rendered a just and legal decision to issue the inspection warrant. Moreover, courts have uniformly been liberal in sustaining the issuance of warrants for the purpose of ensuring the vitality of warrants, as opposed to allowing inspections without warrants.

While Section 8(a) of the Act provides for warrantless inspections of an employer's workplace in order to carry out the purposes of the Act. [13] The instant case is before the court on a duly issued inspection warrant which Defendant-Appellant has disobeyed.

13/ While it is the Secretary's position that a warrant in the first instant was not necessary to gain access to the workplace, he nonetheless obtained the warrant to avoid any delaying challenge to the constitutionality of these proceedings. The Supreme Court has recognized that warrantless inspections for purposes of public safety are allowable in instances of emergency situations or where "there is other satisfactory reason for security immediate entry". Camara v. Municipal Court, 87 S.Ct., at p. 1736, 387 U.S., at p. 540. In view of the efforts by the Secretary to protect Defendant-Appellant's Fourth Amendment rights, it would surely be inappropriate to hold these proceedings unconstitutional as Defendant-Appellant submits.

C. The Jurisdictional Argument

The Secretary of Labor need not show that the employer is a covered employer under the Act prior to conducting an inspection pursuant to the Act. Questions of coverage and/or exemptions must be adjudicated in the administrative forum provided by the Act.

Justice Brandeis's opnion in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41(1938), is the classic expositon of the rule that challengers of agency jurisdiction must first exhaust their administrative remedies before seeking judicial review. In Myers, a party charged with an unfair labor practice was precluded from challenging the jurisdiction of the NLRB until the Board's adjudicatory process had resulted in a final order. The theory behind this exhaustion doctrine is to provide more efficient, as well as consistent coordination of court and agency action.

Congress has clearly provided an administrative remedy through which M & B industries, Inc. can assert its exemption claims. The Act created a centralized adjudicatory forum--the Occupational Safety and Health Review Commission--to pass upon all factual and statutory defenses to the Secretary's enforcement actions subject to direct appellate review. If the Secretary fails to show sufficient grounds for its charges, the Commission is authorized to "issue an order, based on findings of fact, . . . vacating the

Secretary's citation or proposed penalty, or directing other appropriate relief." (29 U.S.C. 651(3), 658(a), 659(a) and (c), 660(a) and (b), 661). See, e.g., The Budd Co. v. OSHRC, 513 F.2d 201, 205(3d Cir. 1975); Brennan v. OSHRC and Hanovia Lamp Div., 502 F.2d 946, 947-8(3d Cir. 1974). Where "Congress, as here, specifically designates a forum for . . . review of administrative action, that forum is exclusive . . . and this result does not depend on Congress using work 'exclusive' in the particular statutory review provison)." Gardner v. Alabama, 385 F.2d 804, 810-811 (5th Cir. 1967), cert. den. 389 U.S. 1046. [14] The Myers exhaustion doctrine has been variously restated as follows: "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative (proceedings) have been exhausted;" litigants must pursue such proceedings "to their appropriate conclusion and . . . await . . . their final outcome before seeking judicial intervention;" and, the legislature's command "that administrative judgment be taken initially . . . (means) the courts have no lawful function to anticipate the administrative decision with their own." Macauley v. Waterman S. S. Corp. 327 U.S. 540, 543, 66 S. Ct. 712, 714 (1946); Aircraft and Diesel Corp. v. Hirsch, 331 U.S. 752, 767, 67 S.Ct. 1493, 1500 (1947). See McKart v. U.S., 395 U.S. 185, 193-195 (1969); Frito Lay v. FTC, 380 F.2d 8, 10 (5th Cir. 1967). Most pertinently, Courts have held that even direct appeals from the Commission must be dismissed for lack of

14/ Accord: Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411, 422 (1965); Nader v. Volpe, 466 F.2d 261, 266-268 (D.C.C.R., 1972).

subject-matter jurisdiction where they rest on grounds not urged before that agency or the Commission has simply determined a legal issue and remanded to its administrative law judge for hearing on the merits. E.g., Keystone Roofing Co., Inc., v. OSHRC and Dunlop, ____ F.2d ____, CCH ESHG para. 20,930 (3d Cir. 1976); Felton Const'n. Co. v. OSHRC, 518 F.2d 49 (8th Cir. 1975). These holdings apply a fortiori where M & B Industries Corp. has never placed anything before the Commission but sought to short-circuit the Act's enforcement scheme by preventing any inspection despite the availability of an adequate statutory remedy thereafter.

In Oklahoma Press Co. v. Walling, supra, the Supreme Court considered a Fair Labor Standards Act enforcement scheme which like OSHA authorized both administrative inspections and subpoenas, 327 U.S. at 199 passim. The Court held that neither preliminary proof of statutory jurisdiction nor violations, nor probable cause to believe they existed, was required where Congress did not expressly require them and investigation was subject to judicial review for relevance and reasonableness. 327 U.S. at 202-217. The "necessary effect" of Myers, supra, the Court stated, 327 U.S. at 212 in n. 51:

> was to rule that it was not "an appropriate defense" that coverage had not been determined prior to the (administrative) hearing, or, it would seem necessarily to follow, prior to the Board's preliminary investigation of violation. If this is true in the case of the Board, it would seem to be equally true in that of the Administrator.... if the courts are forbidden to determine coverage prior to the Board's

quasi-judicial proceeding for deciding that question, ... they are forbidden...to decide it prior to the Board's preliminary investigation to determine whether the proceeding shall be instituted. The mere fact that the first stage of formal adjudication is administrative in the one case and judicial in the other would seem to make no difference (in) the power of Congress to authorize either the preliminary investigation or the use of the subpoena power in aid of it (emphasis added).

Moreover, the Court went on, treating inspection and subpoena as identical in this context, 327 U.S. at 201, 210, 216, 218:

> The very purpose of t e subpoena... as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.
>
> * * *
>
> All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by (the statute), the latter expressly, the former by necessary implication. It is not to be doubted that Congress could authorize investigation of these matters.
>
> * * *
>
> The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing... pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited...by forecasts of the probable result of the investigation..."
>
> * * *

> It is to be remembered that petitioners' are not the only rights which may be involved or threatened with possible infringement. Their employees' rights and the public interest under the declared policy of Congress also would be affected if petitioners should enjoy the practically complete immunity they seek (emphasis added).

Accord: U.S. v. Morton Salt Co., 338 U.S. 632, 642-643 (1950).

The Myers exhaustion rule was recently applied to OSHA by the Third Circuit Court of Appeals. There the court held that federal district courts do not have the authority to entertain motions to quash inspection warrants authorizing OSHA inspections, made on the grounds that the Secretary lacked authority to inspect the worksite, since employers must exhaust all administrative remedies prior to seeking relief from the courts on this issue. Matter of Restland Memorial Park, 540 F.2d 626, (3rd Cir. 1976). In Restland, the employer raised the jurisdictional claim that the Secretary of Labor lacked jurisdiction because the employer was not an employer "affecting commerce". The Third Circuit vacated the judgment of the District Court which had denied the motion to quash the inspection warrant, and ordered the proceeding remended with instructions to the District Court to dismiss the motion to quash for lack of subject matter jurisdiction due to the failure to exhaust administrative remedies.

Thus it is clear that an allegation made by an employer that it does not "affect commerce" is not a proper ground for a District Court to refuse to issue an inspection warrant.

D. The Concurrent Jurisdiction Argument

Defendant-Appellant's argument that the Secretary of Labor lacks jurisdiction over the workplace at issue because that workplace may also be subject to inspection made by a city agency is without merit.

Section 4(a) of the Act states "This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, . . . and the Canal Zone," (29 U.S.C. 653(a)). The only exemption provided for in the Act is for working conditions of employees where other Federal agencies, and State agencies acting under section 274 of the Atomic Engergy Act of 1954, exercise their authority to prescribe or enforce standards affecting occupational safety and health, Section 4(b)(1), (29 U.S.C. 653(b)(1)), emphasis added. Thus it is clear from the statute, that notwithstanding any jurisdiction over the workplace that the New York City Fire Department has, the Secretary has jurisdiction to enforce the Act in the subject workplace. [15]

15/ In any event, the alleged lack of jurisdiction over a workplace may not be used to successfully challenge an otherwise valid warrant. See Discussion (c) infra. Nor is the instant matter one arising where a valid state plan promulgated pursuant to Section 18(b) of the Act is in effect. (29 U.S.C. §667(b)). Only after such a plan has been approved by the Secretary, Section 18(c) of the Act, (29 U.S.C. §667(c)), and it has been in operation for at least three years may the Secretary be precluded from enforcing standards promulgated under the Act which are covered by the state plan, Section 18(e) of the Act. (29 U.S.C. §667(e)). New York State has no such plan.

CONCLUSION

For the foregoing reasons, Defendant-Appellant M & B Industries, Inc.'s appeal should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were served this 2nd day of November 1977 by first class mail .

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I N D E X

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED 1

COUNTERSTATEMENT OF THE CASE

1. Nature of the case. 1
2. Counterstatement of facts
   A. Regulatory background 2
   B. The proceedings below 8

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN ISSUING THE WARRANT IN THIS MATTER

A. Fourth Amendment Challenge 9

B. Challange to probable cause of warrant. .13

C. The jurisdictional argument 17

D. The concurrent jurisdiction argument. . .22

CONCLUSION 23

Cases

Aircraft and Diesel Corp. v. Hirsch, 331 U.S. 752 (1947) 18

Argersinger v. Hamlin, 407 U.S. 25 (1972) 7

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (Brandeis, J., corcurring). . .12

Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, ___U.S.____, 97 S.Ct. 1261 (1977). 3, 7, 12

Barlow's Inc. v. Usery, 424 F. Supp, 437 (D.Idaho 1976), probable jurisdiction noted, ___U.S.___, 976 S.Ct. 1642 (1977) 9, 10, 11,12

Page

Brennan v. Buckeye Industries, 374 F. Supp. 1350, (S.D. Ga. 1974) 7, 10,13

Brennan v. Gibson Products of Plano, Inc., 407 F. Supp. 154 (E.D. Tex. 1976) 10, 11

Brennan v. OSHRC and Hanovia Lamp Div., 502 F.2d 946 (3d Cir. 1974). 18

Brennan v. OSHRC and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973) 5

Camara v. Municipal Court, 87 S.Ct 523 (1967). 10, 13,14,15,16

Centrif-Air Machine Co., Inc., 1976-77 OSHD ¶21,478 . .11

Dravo Corporation v. Marshall, U.S.D.C. Penn W.D., Civil No. 77-284 (1977) 12

Dunlop v. Able Contractors, Inc., Civ. No. 75-57-BLD (D. Mont., December 15, 1975), appeal pending, 9th Cir..10, 13

Dunlop v. Hertzler Enterprises, 418 F.Supp. 627 (N. Mex. 1967)(three judge court), appeal pending 10th Cir. . 11

Dunlop v. Rockwell International, 540 F.2d 1283, (6th Cir. 1976). 5

Eaton v. Price, 364 U.S. 263 (1960) 13

Felton Construction Co. v. OSHRC, 518 F.2d 49 (8th Cir. 1975) 19

Frank Irey, Jr., Inc. vs. OSHRC, No. 76-748, 97 S.Ct. 1261 (1977) 12

Frito Lay v. FTC, 380 F.2d 8 (5th Cir. 1967) 18

Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967) . . . 18

Gilbert and Bennett Mfg. Co., In the Matter of Establishment Inspection of, 1977 OSHD ¶21,798 . . . 11

Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976) 5

Keystone Roofing Co., Inc. v. OSHRC and Dunlop, ___F.2d___, CCH ESHG para. 20,930 (3d Cir. 1976) . . . 19

Macauley v. Waterman S.S. Corp., 327 U.S. 540, 66 S.Ct 712 (1946). 18

McKart v. U.S., 395 U.S. 185 (1969). 18

Page

Myers v. Bethlehem Shipbuilding Corp.,
303 U.S. 41 (1938) 17, 18,19,21

Nader v. Volpe, 466 F.2d 261 (D.C.C.R. 1972) . . .18

National Independent Coal Operators Ass'n v. Kleppe,
423 U.S. 389 (1973). 5

Oklahoma Press Pub. Co. v. Walling,
327 U.S. 186 (1945). 13, 19, 20

Restland Memorial Park, Matter of,
540 F.2d 626 (3d Cir. 1976). 21

See v. Seattle, 387 U.S. 541 (1967). 11,15

The Budd Co. v. OSHRC, 513 F.2d 201
(3d Cir. 1975). 18

U.S. v. Morton Salt Co., 338 U.S. 632 (1950). . . 21

Usery v. Godfrey Brake & Supply Service,545
F.2d 52 (8th Cir. 1976) 5, 6

Usery v. Northwest Orient Airlines, 1977 OSHD ¶21,905
(D.C. N.Y. ED 1977) 10, 12, 13

Usery v. Rupp Forge Co., No. C-76-385
(N.D. Ohio, April 19, 1976), appeal pending
6th Cir. 11

Whitney Nat'l Bank v. Bank of New Orleans,
379 U.S. 411 (1965) 18

Statutes and Regulations

Occupational Safety and Health Act of 1970,
29 U.S.C. 651 et seq. 2

Section (2) 29 U.S.C. 651 (1) 2
Section 2(b)(3), 29 U.S.C. 651(3). 18
Section 2(b)(10), 29 U.S.C. 651(10). 5
Section 4(a), 29 U.S.C. 653(a) 22
Section 4(b)(1), 29 U.S.C. 653(b)(1) 22
Section 5(a)(1), 29 U.S.C. 654(a)(1) 3
Section 5(a)(2), 29 U.S.C. 654(a)(2) 3
Section 8(a), 29 U.S.C. 657(a). 3,4,5,6,8,9,10,11,
13, 15, 16
Section 8(d), 29 U.S.C. 657(d). 6
Section 8(e), 29 U.S.C. 657(e). 6
Section 8(f), 29 U.S.C. 657(f). 4
Section 9, 29 U.S.C. 658 . . . . . 3, 7, 18

Section 10(a), 29 U.S.C. 659(a) 3,5,7,18
Section 10(b), 29 U.S.C. 659(b) 4,5
Section 10(c), 29 U.S.C. 659(c) 18
Section 11(a), 29 U.S.C. 660(a) 18
Section 11(b), 29 U.S.C. 660(b) 4, 18
Section 11(c), 29 U.S.C. 660(c) 4
Section 12, 29 U.S.C. 661 18
Section 13, 29 U.S.C. 662 4
Section 15, 29 U.S.C. 664 6
Section 16, 29 U.S.C. 665 6
Section 17(a), 29 U.S.C. 666(a) 7
Section 17(b), 29 U.S.C. 666(b) 7
Section 17(c), 29 U.S.C. 666(c) 7
Section 17(d), 29 U.S.C. 666(d) 7
Section 17(e), 29 U.S.C. 666(e) 7
Section 17(f), 29 U.S.C. 666(f) 5
Section 17(h), 29 U.S.C. 666(h) 7
Section 17(i), 29 U.S.C. 666(i) 7
Section 17(j), 29 U.S.C. 666(j) 7
Section 18(b), 29 U.S.C. 667(b) 22
Section 18(c), 29 U.S.C. 667(c) 22
Section 18(e), 29 U.S.C. 667(e) 22

29 CFR 1903.4 . . . . . 6, 7
29 CFR 1903.7(a). 6
29 CFR 1903.7(c). 6
29 CFR 1903.7(d). 6
29 CFR 1903.7(e). 6
29 CFR 1903.8 6
29 CFR 1903.9 6
29 CFR 1904.8 4

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Ohio and *Rollins* cases, one would think that this would be significant to my colleagues. Apparently, they apply their requirement for a showing of prejudice only when it works to the advantage of the Secretary. Furthermore, they don't explain why the 18-day "clerical error" in this case should be treated differently than the 79-day one in the *Rollins* case. I submit that the difference is that the error is by the employer in this case and was by the Secretary in the *Rollins* case. Obviously, that is an improper distinction and should not be the basis for denying respondent its right to litigate the propriety of the citation.

[¶ 21,478] W. J. Usery, Jr., Secretary of Labor, United States Department of Labor v. The Centrif-Air Machine Co., Inc.

Text of opinion of the United States District Court for the Northern District of Georgia, Atlanta Division. No. C-76-1551 dated January 10, 1977.

The Act—Constitutionality—Inspections—Warrants—Probable Cause. OSHA's request for a warrant to inspect the premises of a textile machinery manufacturer was denied because probable cause was not shown. The company's owner had denied entry to an OSHA inspector attempting to make a routine inspection, stating that such an inspection without a warrant violated its rights against unreasonable searches and seizures under the Fourth Amendment. It was ruled that probable cause was not shown because no employee complaint had been filed, and the only basis for selecting the company for inspection was that it had never before been inspected. The Judge relied on the decision in *Gibson Products, Inc.* (1975-1976 OSHD ¶ 20,365) in ruling that OSHA must obtain a warrant upon a showing of probable cause to conduct an objected-to inspection.

Back reference: ¶ 508.

Before RICHARD C. FREEMAN, District Judge.

[Text of Opinion]

This is an action wherein petitioner, the Secretary of Labor, seeks an order pursuant to the Occupational Safety and Health Act of 1970, *29* U. S. C. § 651, *et seq.* [hereinafter "OSHA"] compelling the inspection of the business premises and records of The Centrif-Air Machine Co., Inc. [hereinafter "Centrif-Air"]. Respondent objects to the issuance of such an order contending that a nonconsensual inspection of his premises without first obtaining a search warrant based upon probable cause violates its right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution. At this juncture, a brief review of the salient facts and the scope of OSHA legislation is warranted.

On September 16, 1976, at approximately 1:00 P. M., Oliver J. Chastain, a Compliance Officer for the Occupational Safety and Health Administration, United States Department of Labor, requested admittance to Centrif-Air's premises at Duluth, Georgia and was refused such admittance by Lofton H. Smith, the owner and general manager of Centrif-Air. Mr. Chastain reiterated the fact that his purpose simply was to make a safety inspection pursuant to OSHA, but Mr. Smith still contended that Mr. Chastain would need a "court order" before he would be allowed to enter the premises. Mr. Chastain left the premises, and thereafter, on September 20, 1976, the Secretary of Labor brought the instant action to compel Centrif-Air to allow the Secretary to inspect respondent's premises and records.[1]

The Congressional mandate embodied in OSHA places a duty upon employers to

> furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U. S. C. § 654(a)(1). The specific authority which petitioner now seeks to invoke is contained in *29* U. S. C. § 657(a), which provides that "the Secretary, upon presenting appropriate credentials to the owner, operator or agent in charge, is authorized—

> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials

[1] Testimony adduced at the hearing of this action on October 28, 1976 suggests that the only records properly subject to OSHA inspection would be health and safety records. (Hearing R. 25).

Exhibit A

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therein, and to question privately any such employer, owner, operator, agent or employee.

Some difficulty in interpretation of OSHA is generated by the fact that Congress did not itself enact enforcement provisions relative to this broad authority to inspect. *In re Rupp Forge, infra.* Nevertheless, 29 CFR § 1903.4 does provide that when a compliance officer is refused admittance, "[t]he Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process if necessary." 29 CFR § 1903.4. Procedures contained in the OSHA Compliance Operations Manual suggest that while an inspection warrant may be obtained, the department does not view such a step as mandatory before resorting to "compulsory process."[2] In any event, it is undisputed that no search warrant was ever obtained in the instant action and that there would have been no basis in fact for the issuance of such a warrant.[3]

Nevertheless, petitioner argues that the inspection which it seeks is supported by *Brennan v. Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S. D. Ga. 1974).

In *Buckeye* the court held that a warrantless inspection without probable cause was authorized by § 657(a) of OSHA and was valid under the Fourth Amendment. The *Buckeye* holding was bottomed upon several Supreme Court decisions governing the scope of nonconsensual administrative inspections, including *Camara v. Municipal Court*, 387 U. S. 523 (1967); *See v. City of Seattle*, 387 U. S. 541 (1967); *Colonnade Catering Corp. v. United States*, 397 U. S. 72 (1970); and *United States v. Biswell*, 406 U. S. 311 (1972). Taken together, *Camara* and *See* stand for the proposition that while nonconsensual administrative inspections of commercial premises are authorized, such inspections may only be accomplished upon presentation of a warrant based upon satisfaction of a flexible probable cause standard.[4] In its subsequent decisions in *Colonnade* and *Biswell*, however, the Court rejected any warrant requirement where the premises sought to be inspected were federally licensed to deal in the sale of liquor and firearms respectively. The *Buckeye* court logically interpreted the *Colonnade* and *Biswell* decisions as an extension of *Camara* and *See* which would soon totally subsume the warrant requirement in the area of nonconsensual administrative inspections.

In light of more recent precedent, see *Alameida-Sanchez v. United States*, 413 U. S. 266 (1973) (expressly reaffirming *Camara* and *See*); *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U. S. 861 (1974) (generally reaffirming *Camara* and *See* after *Buckeye*) we must reject the *Buckeye* court's interpretation. Rather we agree with several recent well-reasoned decisions which have construed *Colonnade* and *Biswell* as narrow exceptions to *Camara* and *See* which operate to negate the warrant requirement for unconsented administrative inspections only when: (1) the enterprise sought to be inspected is engaged in a pervasively regulated business; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent federal interest; and (4) the inspection may be carefully limited as to time, place and scope.

[2] OSHA Compliance Operations Manual, pp. V-6 to V-7 (January 1972), provides:

. . .

b. In cases where a CSHO encounters a refusal to permit entry, he should advise his Area Director, who will in turn refer the matter to the appropriate Regional Administrator and the Regional Solicitor with a request that an inspection warrant be obtained.

c. If an employer refuses to permit an inspection, the CSHO should advise the employer that the Act (Section 8(a)) provides for an inspection, but he shall not state or imply that the law provides any penalty for refusing permission to inspect. If there is still a refusal to permit inspection, CSHO shall endeavor to ascertain the reason for such refusal. He will leave the premises and shall immediately report the refusal and the reason therefore to the Area Director. The AD shall immediately consult with the Regional Administrator and the Regional Solicitor who shall promptly take appropriate action including compulsory process, if necessary.

. . .

e. In cases where entry has been allowed and the employer interferes with or limits an important aspect of the investigation, the CSHO should decide whether to complete the inspection and through the Area Director alert the Regional Administrator, and request the Regional Solicitor to seek an inspection warrant. For example, if the employer refuses to permit the walk-around or to permit the CSHO to examine records which are essential to the inspection, the inspection should be discontinued and an inspection warrant sought. In other cases where the employer interferes with or limits the inspection, the inspection should be completed and the matter discussed with the Area Director as to further appropriate action.

[3] At the evidentiary hearing conducted by this court it became apparent that no complaint had been lodged by an employee against Centrif-Air and that petitioner had no other basis in fact for believing that violations existed on respondent's premises. Rather, it was evident that respondent's facility had been selected for inspection on a semi-random basis; the only criterion pertinent to its selection being the fact that it had not previously been inspected.

[4] The flexible probable cause standard suggested by *Camara* would, in its simplest form, involve balancing the need to search against the intrusion which searching would entail.

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Secretary of Labor v. Sandia Die and Cartridge Co., 418 F. Supp. 627 (D. N. M. 1976); *Brennan v. Gibson Products*, 407 F. Supp. 154 (E. D. Tex. 1976) (three judge); *In Re Inspection of Rupp Forge Co.*, — F. Supp. —, 4 OSHC 1487 (N. D. Ohio April 1976), see also *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F. 2d 84 (5th Cir. 1975). In the instant action, the inspection sought does not come within the first branch of this test[5] since Centrif-Air's business, the manufacture and sale of textile machinery, is not subject to pervasive state or federal regulation. See *Secretary of Labor v. Sandia Die and Cartridge Co., supra* (the manufacture of ammunition did not qualify as an area of pervasive federal regulation.) The failure of the Secretary to satisfy this prong of the test alone is fatal to the instant application for an order compelling inspection, see *Brennan v. Gibson Products, supra*, for the four exceptional circumstances excusing the warrant requirement in administrative searches are cumulative rather than merely repetitive; therefore, we need not also determine whether the other elements of minimal intrusion and reasonableness have been satisfied. Accordingly, we conclude that constitutional application of the inspection provisions contained in 29 U. S. C. § 657(a) in the absence of respondent's consent is governed by the traditional administrative inspection rule embodied in *Camara* and *See*, and that petitioner, therefore, must obtain a warrant based upon a preliminary finding of "probable cause"[6] before being allowed to inspect Centrif-Air's premises.[6]

Accordingly, for the reasons hereinabove expressed, the instant petition for an order compelling inspection is hereby denied, and the action is hereby ordered to be dismissed.

[¶ 21,479] Bechtel Power Corporation v. Secretary of Labor.

Text of opinion of the United States Court of Appeals for the Eighth Circuit. No. 76-1365 dated January 25, 1977. The Judge's Decision appears at ¶ 18,456, 1974-1975 OSHD and the Review Commission at ¶ 20,503, 1975-1976 OSHD.

Construction Standards—Scope—Applicability to Company Acting as Construction Manager. A company which acted as construction manager on a power plant project was subject to the construction standards of Part 1926, even though it did no construction work and had no craft labor. To carry out its project management functions, which included design of the plant, administration and coordination of construction on behalf of the owner, and daily inspections of the work, the company employed 33 administrative and office personnel and 50 engineers, timekeepers, and safety inspectors. Their duties took them all over the jobsite, and the record provided both direct and circumstantial evidence of exposure to the cited hazards. It was found that the company performed a vital function in the total activities of the construction project. The employer argued that when OSHA adopted the standards first adopted under the Construction Safety Act, the coverage was not expanded to persons engaged solely in engineering and management functions, but instead, the Construction Safety Act's restrictive application to contractors and subcontractors who employ laborers and mechanics was retained. This was rejected because the Secretary adopted only the substantive safety rules and not interpretative rules. The Secretary acted within his authority in extending the applicability of the standards to every employer, employee, and place of employment involved in construction work. The employer also contended that it neither created nor controlled the violative conditions. This was rejected because it was responsible for the site's safety program and thus possessed the power to protect its employees.

Back reference: ¶ 1130.

Before LAY, ROSS and WEBSTER, Circuit Judges.

[Text of Opinion]

Bechtel Power Corporation (Bechtel) seeks review of a final order of the Occupational Safety and Health Review Commission. The Commission found Bechtel responsible for the exposure of its employees to five non-serious violations of § 5(a)(2) of the Occupational Safety and Health Act of 1970, (OSHA), 29 U. S. C. § 654(a)(2), on a construction site at Crystal City, Missouri, where Bechtel was the construction manager for the building of a power plant.

[5] See fn. 4, *supra*.

[6] We decline to follow the holding of *Barlow's, Inc. v. W. J. Usery*, — F. Supp. —, 6 OSHC 979 (D. Idaho, Dec. 30, 1976) (three judge) to the effect that the OSHA enforcement provisions are *per se* unconstitutional. Rather, we believe, as did the court in *Brennan v. Gibson Products*, 407 F. Supp. 154 (E. D. Tex. 1976) (three judge), that when the evidence is conflicting and inconclusive, we must presume that Congress intended to act in a constitutional manner by requiring that nonconsensual inspection under OSHA be authorized by an inspection warrant based upon probable cause.

OSHRC Judge's decisions become final if review not directed within 30 days of filing. For further action if any, see Case Table at ¶ 7995.

[¶ 21,798] Gilbert and Bennett Manufacturing Co., a Corp.

Text of opinion of the United States District Court, Northern District of Illinois, Eastern Division dated April 12, 1977. Civil No. 77 C 856.

Constitutionality—Inspections—Warrants—Probable Cause—Employee Complaint—Previous Violations. An employer's motion to quash a warrant issued for an OSHA inspection of its premises was denied and the employer was held in contempt for refusing to permit the inspection as ordered by the warrant. Following the employer's initial refusal to allow an inspector entry, OSHA obtained an inspection warrant after presenting evidence of previous OSHA violations by the employer and stating that the inspection was to be conducted in response to an employee complaint of a dangerous working condition. The employer argued that sufficient probable cause to justify the inspection warrant was not shown, but it was ruled that the warrant was obtained pursuant to that level of probable cause appropriate to administrative warrant cases. The employer also argued that the warrant was overbroad because it authorized an inspection of the entire premises and was not limited to the matter involved in the employee complaint. It was ruled that the probable cause requirement excludes the potential for entrance into a business establishment as a mere fishing expedition, and once established, OSHA inspectors are entitled to enter the premises and reasonably investigate hazardous working conditions; to hold otherwise would unreasonably restrict the goals outlined in the legislation without reason since the warrant requirement adequately protects the employer's rights.

Back references: ¶ 508; 4025.

R. Clay Bennett for the employer. Carin Ann Clauss, Herman Grant and Edward A. Bobrick for the Secretary.

Joel M. Flaum, Judge.

[Text of Opinion]

Before the court are the petitioner's motion to show cause why respondents shall not be held in contempt for failure to comply with an OSHA [Occupational Safety Health Administration] [sic] warrant for inspection and respondents' motion to quash said warrant for failure to comply with the fourth amendment guarantees. [The facts are not in dispute and the issue is before the court on purely legal matters.] Following a complaint by an employee of Gilbert and Bennett Manufacturing Company (Gilbert and Bennett) to the regional OSHA office regarding a dangerous working condition, petitioner's agents sought admittance to respondents' business establishment for purposes of inspection. Respondents Roth and Elton refused admittance to the OSHA inspectors and the inspectors appeared before a Magistrate presenting evidence as to the employee complaint, previous OSHA violations, and respondents' refusal to permit inspection. The Magistrate issued a warrant for inspection, however, respondents persisted in refusing admittance. This motion for a show cause order resulted, and the motion to quash is in the nature of a defense to that action.

The court has considered the authorities cited by the parties and is persuaded that the instant action is governed by *See v. Seattle*, 387 U.S. 541 (1967) and *Camara v. Municipal Court*, 387 U.S. 523 (1967). The warrant appears to have been obtained pursuant to that level of probable cause appropriate to administrative warrant cases. *Id.* at 536-39. The respondents' argument that the more stringent requirements for probable cause to search a dwelling or seize an individual is applicable to this administrative proceeding must be rejected.

Similarly, in light of the stay of injunction ordered by Mr. Justice Rehnquist in *Marshall v. Barlow's Inc.*, [See Exhibit 1 Petitioner's Memorandum in Opposition to Motion to Quash] the court need not now engage in an extended analysis of the constitutionality of the OSHA inspection procedures. In the circumstances of the instant case the court can be guided by the constitutional analysis set forth in *Brennan v. Gibson's Products Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976) (three judge court). The remedial construction given the OSHA inspection procedures in that decision were adhered to in the case at bar.

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Exhibit B

and the court perceives no impropriety in such a warrant procedure.

The respondents' final argument in support of the motion to quash the warrant is that the warrant is overbroad as it authorizes a reasonable inspection of the entire premises not limited to the matter involved in the employee complaint. The probable cause requirement excludes the potential for entrance into a business establishment as a mere fishing expedition to discover possible infractions of OSHA regulations, and, once established, OSHA inspectors are entitled to enter the premises and reasonably investigate the hazardous working conditions. To hold otherwise and confine the investigation to the substance of the employee complaint would unreasonably restrict the goals outlined in the legislation without reason as the warrant requirement adequately protects the respondents' rights.

Accordingly, the motion to quash the warrant is denied.

This cause having come to be heard on April 5, 1977, pursuant to the Order to Show Cause entered herein on March 15, 1977 by U.S. Magistrate Carl B. Sussman's Order and Certification of Facts under 28 U.S.C. 636 and it appearing that on the facts set forth therein and attached hereto (verified Affidavits Compliance Officers Peter Cucuz and James S. Kontos) respondents Gilbert and Bennett, Raymond H. Routh and Frank A. Elton have failed and refused to comply with a proper Warrant for Inspection under the Occupational Safety and Health Act of 1970 and it appearing to this court that respondents Gilbert and Bennett, Raymond H. Routh and Frank A. Elton have failed to show cause why they should not be held in civil contempt of this court; it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

1. That the respondents' Gilbert and Bennett, Raymond H. Routh and Frank A. Elton are in civil contempt of this court by their failure to comply with Warrant for Inspection issued by Magistrate Sussman on March 2, 1977.

2. That respondents in order to purge themselves of said contempt permit James S. Kontos, and any other compliance officers of the Occupational Safety and Health Administration, United States Department of Labor to enter the workplace described as:

Gilbert and Bennett Manufacturing Company
West 128 and South Kedzie Avenue
Blue Island, Illinois

forthwith during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent (including but not limited to the taking of photographs and samples and to question privately any employer, owner, operator, agent or employee of the establishment), the workplace or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act.

3. That upon failure of the respondents to purge themselves of their contempt of this court in a timely manner and such failure is made to appear by an affidavit of the petitioner's attorney which is duly filed with the court showing that a copy of said affidavit (and a copy of this Order) has been served upon respondent by certified mail, the Marshal shall within five days after the filing of said Affidavit take Raymond H. Routh and Frank A. Elton into custody and bring them before this court to show why further appropriate sanctions should not be ordered by this court.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DRAVO CORPORATION (Dravo Engineering Division), Plaintiff	:	Civil Action No. 77-284
vs.	:	
RAY MARSHALL, SECRETARY OF LABOR, CHARLES A. STRAW, OSHA AREA DIRECTOR, and WILLIAM T. DRAPER, OSHA COMPLIANCE OFFICER, Defendants	:	
In the matter of	:	
ESTABLISHMENT INSPECTION OF DRAVO CORPORATION, 4800 Grandview Avenue Neville Island, Pa.	:	No. 77-0056 - M.

MEMORANDUM

BARRON P. McCUNE, District Judge
April 5, 1977.

On March 15, 1977, Dravo Corporation (Dravo) filed a complaint for a Preliminary Injunction seeking to restrain the Secretary of Labor (Secretary) and Charles A. Straw (Straw), Area Director of the Occupational Safety and Health Administration (OSHA), and William P. Draper, a compliance officer of OSHA, from making further inspections of the Neville Island plant of Dravo.

Meanwhile, Dravo took an appeal from the order of a Magistrate refusing to quash a warrant which he had issued upon application of the Area Director permitting the inspection which the Area Director had ordered.

Exhibit C

BEST

The appeal from the magistrate's order was consolidated with the complaint for the Preliminary Injunction by agreement of counsel.

A hearing in both proceedings was held March 31, 1977.

Following consideration of the testimony and the briefs of counsel, we will affirm the action of the magistrate and deny the complaint for a Preliminary Injunction.

This case arises from the frustration and irritation occasioned by repeated inspections under the OSHA Act of 1970.

The complaint alleges that Section 8(a) of the Act (28 U.S.C. 651, et seq.) is unconstitutional as in violation of the Fourth Amendment in that it does not provide for the issuance of search warrants. The complaint states that since a search warrant is required to enter private premises under the Fourth Amendment, Congress clearly acted beyond its authority; that the application for the search warrant was defective in any event, and thus the warrant was improperly issued, because the application did not allege probable cause and contained obvious mistakes or falsehoods and finally, that Dravo has been the victim of vindictive enforcement (the term used by criminal lawyers is "selective prosecution") in that it has suffered 24 inspections since implementation of the act. 1/

The Secretary of Labor defends the constitutionality of th. .ct, supports the validity of the search warrant while

---

1/ Dravo admitted compliance officers on January 4, 1977, without objection, to investigate a specific complaint. It was when the officers stated that they would first make a general inspection that Dravo revolted on the grounds that they had already been inspected several times. Dravo does not object to inspections of specific complaints. It does object to an overall meticulous inspection which it seeks to enjoin. Defendants admit that the general inspection will be meticulous. The warrant was obtained March 8, 1977, as an administrative inspection warrant which authorizes a general inspection. Dravo also argues that an overall administrative inspection warrant fails to specify the area to be searched.

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appearing to argue that no warrant is necessary and contends that plaintiff has failed to exhaust administrative remedies. The Secretary denies any vindictive enforcement.

Constitutionality

While we understand Dravo's irritation, we decline to hold Section 8(a) of the Act unconstitutional. That issue has been faced recently by at least two courts and is on appeal at this time to the Supreme Court. The issue, therefore, does not demand a lengthy opinion here. The courts which have considered the issue have divided, a three-judge court in the District of Idaho having held Section 8(a) unconstitutional, see Barlow's Inc. v. Usery, CCH, 1976-1977, OSHD, p. 25,709 (D. Idaho 1976) and a three-judge court in the Eastern District of Texas having held that since the Secretary has provided in 29 C.F.R., §1903.4 for the obtaining of compulsory process where necessary, the Act should be construed as constitutional, see Brennan v. Gibson's Products, Inc., 407 Fed. Supp. 154 (E.D. Texas, 1976). The Northern District of Georgia has enjoined warrantless searches, see Usery v. Centrif-Air Machine Co., Inc., 4 BNA OSHC 1961 (N.D. Ga. 1977).

These opinions consider all of the precedents and we see no point in adding further comment. Since the Secretary has provided for the obtaining of a warrant when a citizen refuses to admit an inspector, we adopt the view expressed by the Texas court in Brennan, supra. 2/ Thus, we construe the Act to be constitutional but hold that when a citizen refuses to admit an inspector he shall proceed as the Secretary has directed in 29 C.F.R. §1903.4.

2/ Reference is made to that opinion for a thorough review of the precedents. We adopt that opinion including the view that the court had jurisdiction.

Vindictive Enforcement

On the issue of vindictive enforcement we believe that it is true that Dravo has suffered far more inspections than its competitors have,[3/] but the hearing produced pretty solid evidence that Dravo does not charge the vindictiveness to the government but instead charges the union which represents its employees with a vindictive attitude. Defendants' Exhibit B, made a part of the record, is a letter written by the Vice-President of Dravo to Dr. Morton Corn, Assistant Secretary of Labor, on May 25, 1976. The letter states that

> "We make no claim that Dravo Corporation is the victim of gross discriminiation by the OSHA Pittsburgh Office. We have no facts to support such a statement. We do believe that we have received an inordinate number of visits . . . . However, we know that most of these visits have occurred as the result of complaints from employees. . . . and we are aware that OSHA is legally required to act upon such complaints. It is our belief that the employees' union at Neville Island has found OSHA to be a convenient tool in a program of harassment in an effort to obtain concessions which have no relation to safety or health."

The letter continues to point out that on a number of occasions the complaints were groundless but, once in the plant, the compliance officers were forced by union members to investigate other situations and sooner or later some condition is found which appears to justify a citation.

Thus, it appears that Dravo is convinced that the harassment is the union's work, not the government's, per se.

It is true that the Area Director is required to investigate all complaints whether formal (signed by someone) or anonymous (from a confidential informant, so to speak). The Area

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3/ The evidence as to the inspections Dravo's competitors have suffered was not very precise but other boat yards have had perhaps one or two inspections or perhaps as many as three. None, however approach 24 inspections.

Director testified that if he did not promptly service certain of these complaints, he might, and often did, get pressure from people in political life, including Congressmen, to make greater effort. It became obvious during his testimony that he was hard put to service all of his complaints [4/] and that the more complaints he received from a given plant, the more inspections he made there. It is also obvious that under the Act government inspectors can be drawn into a given plant, to the extent that they virtually ignore other plants, by an inordinate number of complaints from one source, whether based on merit or not.

It would seem obvious that this should not occur but a court is poorly equipped to deal with this problem. We can scarcely enjoin OSHA complaints nor direct the Area Director how to do his work, especially when he is constrained by the Act. It would seem, however, that the Area Director possesses a large measure of discretion which he might start to use. Whether some of his fetters should be removed should be left to the Congress since we should not be put in the position of re-writing the Act. It is fairly certain, however, that Congress did not intend that the Area Director devote his time to one plant even though the union there is militant and files many complaints and it is fairly certain that Congress did not intend that an Area Director credit every complaint he receives especially where he knows that the plant in question is comparatively safe, which seemed to be implici in the testimony here. It is, of course, clear that Congress did not intend that an Area Director give in to policital pressure or pressure from unions. The purpose of the Act is clear.

The Administrative Search Warrant

As to the application for the search warrant, we agree

4/ The Area Director has 36 compliance officers.

with the Magistrate that there was sufficient in it to justify the issuance of a warrant. It is not necessary to examine each allegation of the plaintiff attacking the numerous allegations in the application or the accompanying affidavits reminiscent of the attacks by criminal lawyers on the affidavits of police officers. On the whole, there was sufficient in the application to justify a magistrate in finding probable cause to believe that violations were sufficiently present to justify an inspection. General inspections are permitted by the Act and administrative warrants may be issued upon a showing less stringent than required for a criminal warrant, see Camera v. Municipal Court, 387 U.S. 523 (1967).

Exhaustion of Administrative Remedies

We hold that there is jurisdiction here to determine the necessity for and the sufficiency of a search warrant and that the administrative remedies set forth in the Act need not be first exhausted, see Barlow's Inc. v. Usery, supra.

Accordingly, the petition for a Preliminary Injunction will be denied and the Magistrate will be affirmed. Dravo shall permit the inspection to continue whether general in nature or specific in nature. We urge, however, that the Area Director begin to use more of his discretion to the end that the Act be more evenly administered throughout his territory which embraces 23 of the western counties and hundreds of places of employment.

An order follows.

/s/ Hunt McCune

HARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DRAVO CORPORATION
(Dravo Engineering Division),

Plaintiff

vs.

Civil Action No. 77-284

RAY MARSHALL, SECRETARY OF LABOT, CHARLES A. STRAW, OSHA AREA DIRECTOR, and WILLIAM T. DRAPER, OSHA COMPLIANCE OFFICER,

Defendants

In the matter of

ESTABLISHMENT INSPECTION
OF DRAVO CORPORATION
4800 Grandview Avenue
Neville Island, Pa.

No. 77-0056 - M.

ORDER

AND NOW, April 5, 1977, the Petition for a Preliminary Injunction is denied. The action of the Magistrate in refusing to quash the search warrant, which he issued, is affirmed.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

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